

STATE OF MICHIGAN
COURT OF APPEALS

ELAINE POOLE,

Plaintiff-Appellant,

v

MIDVEST LLC,¹ JARVIS PAINTING, INC, d/b/a
JARVIS CONSTRUCTION, and JARVIS
CARPET CLEANING,

Defendants,

and

The MARTIN W. STAGNER and LINDA L.
STAGNER REVOCABLE LIVING TRUST,
LINDA L. STAGNER, and MARTIN W.
STAGNER,

Defendants-Appellees.

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

In this dispute arising out of the sale of a home, plaintiff Elaine Poole (“Poole”) appeals as of right the trial court’s grant of summary disposition in favor of defendants the Martin W. Stagner and Linda L. Stagner Revocable Living Trust (“Stagner Trust”), Martin W. Stagner and

¹ Although it is not entirely clear from the record, it appears that this entity has been misidentified. According to documents submitted in the lower court record, at the January 4, 2001 closing, the Martin W. Stagner and Linda L. Stagner Revocable Living Trust transferred the home at issue to Michvest, LLC and Michvest, LLC sold the home to plaintiff under a land contract.

Linda L. Stagner (collectively the “Stagners”)² as to each of her claims. We affirm in part, reverse in part and remand for further proceedings.

In December 2000, William T. Monaghan, who was the conservator for the estates of Martin W. Stagner and Linda L. Stagner, entered into an agreement to sell the Stagners’ former residence to Poole. During the course of preparing for the closing, Monaghan discovered that the home was actually owned by the Stagner Trust. Thereafter, Monaghan obtained permission from the trustee of the Stagner Trust, Paul T. Joseph, to continue to handle the sale on behalf of the trust.

After Poole entered into the agreement to purchase the home, but before the January closing, her realtor discovered that the heat had gone out in the house and that the home had been damaged by leaking water pipes. After learning of the water damage, Monaghan engaged the services of Jarvis to clean and restore the home. Thereafter, plaintiff’s realtor walked through the home and noticed several other defects, which the trustee later agreed to repair in an addendum signed at the closing. On January 4, 2001, the closing occurred.

After Poole began to move into the home she noticed several additional problems including a water leak, water spots and drippings, kitchen cabinetry that was detaching from the walls, buckling walls, carpet damage, improperly working lights and toilets, as well as mold and mildew. In January 2004, Poole sued defendants to recover for losses incurred as a result of the broken plumbing. In February 2006, the trial court granted summary disposition in favor of defendants as to each of Poole’s claims. After her motion for reconsideration was denied, Poole appealed as of right.

This Court reviews de novo the trial court’s decision whether to grant summary disposition. *Moore v Cregeur*, 266 Mich App 515, 517; 702 NW2d 648 (2005). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Cawood v Rainbow Rehab Centers, Inc.*, 269 Mich App 116, 119; 711 NW2d 754 (2005). Summary disposition is appropriate under MCR 2.116(C)(10) if “there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” In considering a motion brought under this subsection, the court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Williams v Medukas*, 266 Mich App 505, 507; 702 NW2d 667 (2005), citing *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). “Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.” *Maiden, supra* at 120.

² Jarvis Painting, Inc, doing business as Jarvis Construction, Jarvis Carpet Cleaning (“Jarvis”) and Michvest, LLC are not parties to this appeal. Therefore, we shall use “defendants” to refer collectively to the Stagner Trust and the Stagners.

We shall first address plaintiff's argument that the trial court erred when it dismissed plaintiff's claim under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*, and contract claim.³ We conclude that the trial court correctly dismissed both claims.

The MCPA prohibits "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." MCL 445.903. Under MCL 445.902(d), "trade or commerce" is defined to mean "the conduct of a business providing goods, property, or service" Hence, the MCPA applies only to the conduct of a business. Because the sale of the home did not involve the "conduct of a business," the sale is not subject to the requirements of the MCPA. Therefore, summary disposition of this claim was appropriate.

Plaintiff also claims the trial court erred when it dismissed her contract claim. Specifically, plaintiff contends that defendants agreed to make repairs to the home, as evidenced by the addendum to the agreement governing the sale of the home, but those repairs were not completed in a workmanlike manner. We find this claim to be without merit.

In her complaint, plaintiff alleged that Jarvis breached its contract with the Stagner Trust when it failed to repair the house in a workmanlike manner. As pleaded, this claim did not allege a breach of contract on the part of any defendant other than Jarvis and did not allege that defendants were liable for Jarvis' alleged breach. Because plaintiff stipulated to the dismissal of Jarvis from the suit with prejudice, by the time the trial court granted summary disposition, this claim was no longer applicable. Finally, to the extent that plaintiff raises a new contract claim based on the addendum or attempts to revive her contract claim under a theory of vicarious liability, we conclude that these claims were not properly pleaded or raised before the trial court. Therefore, we decline to address them. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

We shall next address plaintiff's claim that the trial court improperly dismissed her claims for fraudulent misrepresentation, innocent fraud and silent fraud.⁴

In order to prove fraudulent misrepresentation or common-law fraud, a plaintiff must show that

³ We note that, although plaintiff contends that the trial court erred when it dismissed all her claims, plaintiff did not directly address her claim based on negligence in her brief on appeal. Because this issue was not adequately briefed, we conclude that plaintiff has abandoned it on appeal. See *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001).

⁴ We note that, in Count V of her complaint, plaintiff asserted a claim for rescission. However, rescission is an equitable remedy, *Lenawee County Bd of Health v Messerly*, 417 Mich 17, 31; 331 NW2d 203 (1982), which may be appropriately granted in cases involving fraud, *Alpert Indus, Inc v Oakland Metal Stamping Co*, 379 Mich 272, 276; 150 NW2d 765 (1967), rather than a specific cause of action. Hence, as pleaded, this claim is essentially a fraud claim coupled with a request for a specific form of relief. Therefore, the analysis applicable to the fraud claims also applies to this claim.

“(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage.” [*M&D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998) (*M & D II*), quoting *M & D, Inc v McConkey*, 226 Mich App 801, 806; 573 NW2d 281 (1997) (*M & D I*).]

For innocent misrepresentation the party alleging the misrepresentation is not required to prove that the party making the representation knew that the representation was false or that the other party intended to deceive. *M & D II*, *supra* at 28. However, the party alleging the misrepresentation must prove that he or she was in privity of contract with the party making the representation and that the injury suffered by the injured party inured to the benefit of the party making the representation. *Id.* The elements of silent fraud are identical to that of common-law fraud except that the misrepresentation supporting the claim for fraud is based on the suppression of a material fact by a party, which that party was duty bound to disclose, rather than an affirmative representation. *Id.* at 28-29.

Before the trial court, plaintiff presented evidence of two alleged misrepresentations concerning the plumbing system, which she claimed supported her fraud allegations. First, plaintiff argued that the disclosure made pursuant to the Seller Disclosure Act (SDA), see MCL 565.951 *et seq.*, falsely indicated that the plumbing was in working order. However, plaintiff failed to present any evidence that this representation was false when the disclosure was made let alone that it was made with knowledge of its falsity or in reckless disregard of its truth and with the intent that plaintiff rely on it.⁵ Indeed, in her brief on appeal plaintiff asserts that the plumbing problem arose in December after she entered into the purchase agreement and, therefore, could not have been discovered through an inspection. Finally, it is clear from the record that plaintiff was actually aware of the water damage and the apparent problem with the pipes. Therefore, we conclude that plaintiff could not have reasonably relied on the earlier disclosure made pursuant to the SDA to support her fraud claims.⁶ See *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 690-691; 599 NW2d 546 (1999) (holding that reliance must be reasonable).

Plaintiff also argued before the trial court that, after the water problem was discovered, the realtor for the seller assured plaintiff that the problem would be fixed and that the home would be restored to the condition it was in before the water damage occurred. Plaintiff presented the affidavit of her realtor, Cindy A. Barach in support of her allegation that

⁵ Although Monaghan was under no duty to issue a disclosure because he was acting as a nonoccupant fiduciary, see MCL 565.953(d), we conclude that the voluntary submission of a materially false disclosure could support a claim for fraud.

⁶ We note that there is no continuing duty under the SDA to update the disclosure. MCL 565.956.

Monaghan and his realtor assured her that the house would be restored to the condition it was in before the water damage. Plaintiff also made similar averments in her affidavit. However, this alleged misrepresentation is really a promise to perform and a claim of fraud cannot normally be based on a promise of future conduct. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 378; 689 NW2d 145 (2004).⁷ However, although this alleged representation is a mere promise of future conduct that does not, by itself, support a claim for fraud, we conclude that Monaghan's subsequent actions in combination with the promise constitute a representation that is capable of supporting plaintiff's fraud claims. See *McDonald v Smith*, 139 Mich 211, 223; 102 NW 668 (1905) (noting that statements coupled with actions can be the equivalent of a false statement); see also *Glazewski v Coronet Ins Co*, 108 Ill 2d 243, 250; 483 NW2d 1263 (1985) ("A representation may be made by words, or by actions or other conduct amounting to a statement of fact.").

After Monaghan's agent allegedly promised to restore the home, Monaghan hired Jarvis to perform the necessary work.⁸ The record indicates that plaintiff was made aware of this work and her agent averred that she walked through the home shortly after the work was completed.⁹ By promising that the house would be restored to its previous condition and then hiring Jarvis, Monaghan created the impression that the work actually performed by Jarvis did in fact restore the home to its previous condition. See *United States v Schwab*, 88 F Supp 2d 1275, 1287 (D Wy, 2000) (noting that "[a]ctive conduct or words which tend to produce an erroneous impression may amount to fraud."). However, it appears from the invoices submitted by Jarvis that only temporary repairs were authorized and performed. These included such things as water extraction, dehumidifying and drying the home and treating the home with germicide and mildewcide. None of the invoices include charges for repairing the plumbing.

From this evidence, a reasonable jury could conclude that Monaghan, as the agent for the Stagner Trust, deliberately caused plaintiff to believe that the plumbing had been repaired while knowing that it had not been properly repaired. The jury could also conclude that Monaghan made the representation with the intent that plaintiff rely on the representation and consummate the sale to her detriment.¹⁰ Hence, there is sufficient evidence to create a question of fact as to

⁷ There is a bad faith exception to this rule. See *Derderian, supra* at 378.

⁸ We reject defendant Linda L. Martin's argument that there is no evidence that the plumbing was not in working order or that Monaghan knew that it was not in working order. Monaghan's affidavit clearly indicates that he was made aware of a problem with the home in December and when he went to the home discovered "water running everywhere." He also stated that he hired Jarvis to clean up and make "necessary repairs." Hence, there is evidence that Monaghan knew that the plumbing had serious problems before the closing.

⁹ Monaghan stated in his affidavit that plaintiff came to the house to view the progress of the repair work.

¹⁰ We reject defendants' contention that the "as is" clause signed by plaintiff rendered plaintiff's reliance unreasonable. "As is" clauses allocate the risk of loss arising from conditions unknown to the parties or that should have reasonably been discovered upon inspection. *Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994). "They do not, however, transfer the risk of loss where 'a seller makes fraudulent representations before a purchaser signs a binding agreement.'" (continued...)

plaintiff's common-law fraud claim. Further, even if the jury concluded that Monaghan did not know that the representation was false or intended to deceive plaintiff, there was sufficient evidence to support a finding that the parties were in privity of contract and that the harm suffered by plaintiff inured to the benefit of the Stagner Trust. Hence, there is a question of fact as to whether this conduct amounted to an innocent misrepresentation. *M & D II, supra* at 27-28. Finally, a reasonable jury could conclude that Monaghan failed to adequately disclose the condition of the plumbing after the general discussions concerning the water damage or that he failed to disclose subsequently acquired information concerning the status of the plumbing. See *Id.* at 31. Thus, there is also a question of fact as to the claim for silent fraud.

Consequently, there is sufficient evidence to create a question of fact for the jury on plaintiff's claims for fraudulent misrepresentation, innocent misrepresentation and silent fraud. However, the evidence in support of these claims does not reveal any connection to either Martin W. Stagner or Linda L. Stagner in their individual capacities or to their estates. Instead the evidence indicates that, although Monaghan was the conservator for the Stagners, he and his realtor were acting on behalf of the Stagner Trust, which actually owned the house. Hence, summary disposition of these claims as to the Stagners was proper.

The trial court did not err when it dismissed plaintiff's claims based on negligence, the MCPA and the Jarvis contract as to each defendant. Furthermore, the trial court did not err when it dismissed plaintiff's remaining claims as applied to Martin W. Stagner and Linda L. Stagner. However, the trial court erred when it granted summary disposition in favor of the Stagner Trust as to plaintiff's fraudulent misrepresentation, innocent misrepresentation and silent fraud claims.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Deborah A. Servitto

(...continued)

Id., quoting *Clemens v Lesnek*, 200 Mich App 456, 460; 505 NW2d 283 (1993). There is no evidence that plaintiff's realtor should have discovered any plumbing problems when she toured the home after Jarvis made the repairs or that, had plaintiff inspected the home before the closing, she should reasonably have discovered the problem with the plumbing. Indeed, because water pipes are often concealed behind walls and in floors, any inspection after the completion of the repairs would have been of limited value. Further, Monaghan averred that he had the water pipes insulated, which would make it difficult to visually inspect those pipes that remained exposed to view.